The Michigan Rules of Professional Conduct (MRPC) –

A "Strict Liability, Quasi-Criminal" Disciplinary Code

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The Michigan Supreme Court has proposed sweeping **AMENDMENTS TO THE MICHIGAN RULES OF PROFESSIONAL (MRPC)**, ADM File No. 2003-62, which can be found at:

http://courts.michigan.gov/supremecourt/Resources/Administrative/2003-62.pdf

The **PROPOSED MICHIGAN STANDARDS FOR IMPOSING LAWYER SANCTIONS (ADM File No. 2002-29),** were re-proposed by the Supreme Court on July 29, 2003, and may be found at:

http://courts.michigan.gov/supremecourt/Resources/Administrative/2002-29.pdf

Both seek to impose the essence of the ABA Model Rules on all Michigan lawyers by adopting over 150 changes to the MRPC, and an entirely new system of disciplinary sanctions. The Comment Period closes December 1, 2004.

The proposals to amend MRPC originated in the Standing Committee on Professional and Judicial Ethics. State Bar of Michigan Special Committee on Grievance generated its own Report and, on November 14, 2003, the State Bar of Michigan Representative Assembly adopted several Resolutions regarding these proposals. Most of the Representative Assembly resolutions were rejected by the Michigan Supreme Court when it re-noticed the proposed adoption of the amended MRPC. Taken together, the contrasting proposals and resolutions contain many of the most profound ethical issues which currently confront our profession. Each of the issues is one vitally affecting the grievance and discipline process and the daily practice of law. Reasonable persons may reasonably differ.

One fundamental difference emerges, which could affect much of our discussion. The premise is succinctly expressed as:

The Michigan Rules of Professional Conduct (MRPC) is a "strict liability, quasi-criminal disciplinary code."

This is not just a matter of semantics. The *sui generis* nature of lawyer discipline gives special emphasis to the seriousness of issues arising under the proposed amendments. At the heart of this is the realization that the MRPC is not a "Statement of Principles," or "Good

Practices," or "Ethical Considerations" (as they were called in the former Model Code of Professional Responsibility). This distinction is made more difficult by our frequently imprecise interchanging of terms like "disciplinary rules of conduct," "ethics," and "professionalism." The MRPC is a set of Disciplinary Rules, the violation of any of which may result in the loss of the professional license to practice. This is why many persons believe MRPC is **not** the place for "better practices," or "what would be nice," or what would be "better public relations" for the Bench and Bar.

On this, Michigan law is clear. Attorney discipline proceedings are "quasi-criminal." In *In re Woll*, 387 Mich 154, 161, 194 NW2d 835 (1972), our Supreme Court said:

> "Although it is not necessary to observe all of the rules of criminal law and procedure in a disbarment proceedings, nevertheless our Court has long recognized that **a disbarment proceeding is quasi-criminal in character**. As this Court stated in *Matter of Baluss* (1874), 28 Mich. 507, 508:
> 'While not strictly a criminal prosecution, **it is of that nature, and the punishment, in prohibiting the party following his ordinary occupation, would be severe and highly penal.'** [Emphasis added.]
> See, also, *In re Clink* (1898), 117 Mich. 619, 76 N.W. 1.

Likewise, "liability" under MRPC provisions is "strict" or "absolute," in that, **at the "liability"/ prosecution stage**, it is usually irrelevant whether the violation was knowing or negligent, intentional or accidental, frequent or isolated, damaging or not. Factors like scienter, intent, history, personal profit, and damage are only "mitigating" factors regarding the "severity of the sanction," but do **not** affect "liability" (except through some unwritten, subjective prosecutorial discretion or grace). In Michigan's bifurcated lawyer discipline system, these factors are not considered until the "adjudicative" phase. [In the future, all of them may not be involved even then. See ADM File No. 2002-29, Proposed Standards 4.4 (Alternative A Strike Outs) and 9.32.]

Although the Comments to the ABA MRPC speak of the importance of "willfulness," the Comments to MRPC are **not** the law.

> "This court allows publication of the comments only as "an aid to the reader," but they are not "authoritative statement[s]." **The rules are the only authority**."
> *Grievance Administrator v Deutch,* 455 Mich 149, 164, 565 NW2d 369 (1997). (Emphasis added.)

The proposed MRPC do not change this. See Proposed Preamble, Scope, Comment [21]:

> "The Preamble and this note on Scope are only intended to provide general orientation and are **not to be interpreted as Rules**. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative." (Emphasis added.)

The cited ABA MRPC Proposed Comment [19] blurs the important distinction between the prosecutorial/ liability phase and the adjudicative phase, saying:

> "Moreover, the Rules presuppose that **whether or not discipline should be imposed** for a violation, **and the severity of the sanction**, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations." (Emphasis added.)

In Michigan, these factors go only to the "degree of sanction," not to the issue of "liability." The Michigan Supreme Court's proposed ADM File No. 2002-29 alternatives make that clear. ABA Proposed Comment [19] provides little solace to Michigan lawyers. [This is another reason why amendments to MRPC and ADM File No. 2002-29 should be considered together, not separately, as recommended by the recent November 14, 2003 Resolution by the Representative Assembly.]

Moreover, in practice, "willfulness" under MRPC does not require intent or scienter. This is true in most jurisdictions. In *Dahlman v. State Bar*, 790 P2d 1322, 1324 (Cal. 1990), it says:

> "Petitioner contends his failure to obey our order of March 23, 1988, was not wilful, but owing to inadvertence and excusable neglect. We have defined "wilful" under rule 955 as " 'simply a purpose or willingness to commit the act, or make the omission referred to**. It does not require any intent to violate the law, or to injure another, or to acquire any advantage.**' " (*Phillips v. State Bar* (1989) 49 Cal.3d 944, 952, 264 Cal.Rptr. 346, 782 P.2d 587.) Moreover, **wilfulness under rule 955 does not require bad faith or actual knowledge of the provision which is violated.** " (Emphasis added.)

Some of the most common disciplinary examples of "strict" liability are **commingling trust funds**, and **conflicts of interest.** At the "liability" stage of a disciplinary proceeding, it does not matter if the conduct was intentional or mistaken, or if it caused damage or not, or if the lawyer knew of it or it was done by an employee without the lawyer's knowledge, or if it resulted in any gain to the lawyer. If there was commingling or a conflict, then the liability is certain. Those other factors (intent, damage, scienter) may go to mitigation of sanction, but do **not** affect the liability determination (other than through prosecutorial grace, based on no written authority or standard). See ADM File No. 2002-29, Proposed Standards 4.4 (Alternative A Strike Outs) and 9.32, and its explanation of the alternative proposals. This is not only what the law IS in Michigan, it is also what it is going to be.

If that is not "strict" (or "absolute", if you wish) liability, then what is?

Why is this important? Again, it is not just semantics. When the sanctions are "quasi-criminal... severe and highly penal," and rooted in concepts of strict and absolute liability, it is both unwise and unjust to base violations on subjective concepts of "negligence" (which

presumes the otherwise necessary elements of proximate causation and damage which are **not** present in MRPC), and undefined, idiosyncratic criteria like "informed consent" (which make it impossible to know with reasonable certainty in advance how to conform one's conduct to the requirements of the law). Many thoughtful persons believe quasi-criminal laws should not do that, because it offends elementary notions of fairness and due process.

Twenty years ago, this was a guiding principle of the American Bar Association's Kutak Commission's proposal of the Model Rules, and their discarding of the undefined "appearance of impropriety" rubric in Canon 9 of the former Model Code. (See Restatement of the Law Third, *The Law Governing Lawyers*, Section 5, Comments b and c.) This is also a principal reason why The ABA Ethics 2000 Proposals were so hotly debated, and why many were approved only by narrow margins. Some persons reasonably view many of these changes as "Back to the Future," undoing much of what the Kutak Commission and ABA then set out to do.

While even some of the Model Rules (i.e., Rule 1.1) reference "neglect," the MRPC is not a proper mechanism with which to regulate lawyer competence. Attempting to regulate lawyer competence with the MRPC, is like trying to teach driver education by using only speeding tickets.

Competence is better addressed by training, continuing education, and specialized programs such as certification. The "neglect" referenced by Rule 1.1(c) is intended more akin to abandonment of the client or matter, or handling a matter with extremely inadequate preparation or research.

An isolated act of professional negligence is well-regulated by the civil tort system, and is **not** a proper subject for professional discipline, unless accompanied by: strong evidence of a course of conduct indicative of a refusal or inability to change; or negligence, combined with other factors, which when taken in the aggregate, provide an independent basis for discipline.

If we think our only tool is a hammer, then we sometimes wrongly see every issue as a nail. The MRPC need not be the vehicle with which to approach every issue of the profession. Some persons believe "good practices" (like "should" admonitions), laudatory ethical considerations (e.g., Pro Bono service), and wise loss prevention (e.g., "confirmed in writing") are all worthy aspirations, recommended topics for CLE, and probably good public relations, but not the stuff of strict liability, quasi-criminal disciplinary codes. Others believe these should be in MRPC.

As J.S. Mill said,

"These are great questions. And on all great questions, much remains to be said."

MRPC Strict Liability Quasi Criminal Code (ver 3 102204).DOC (102204)

The "Perfect Storm" of Michigan Lawyer Ethics and Discipline - New MRPC; New Standards for Sanctions

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The "Perfect Storm" of Michigan lawyer ethics and discipline is brewing, but it is not yet on the radar screens of most Michigan lawyers. Time is short, and prompt action might be required. At a minimum, more discussion and debate might be warranted. The Court is seeking comments not later than December 1, 2004.

The **PROPOSED MICHIGAN STANDARDS FOR IMPOSING LAWYER SANCTIONS (ADM File No. 2002-29),** was re-proposed by the Supreme Court on July 29, 2003, and may be found at:

http://courts.michigan.gov/supremecourt/Resources/Administrative/2002-29.pdf

As proposed, the Standards vary markedly from those earlier proposed by the Michigan Attorney Discipline Board, and also reflect alternatives derived from an independent proposal from Michigan lawyer, Don Campbell.

The **PROPOSALS TO AMEND THE MRPC** (ADM File No. 2003-62) propose a comprehensive rewrite to MRPC, totaling 150+ changes, mostly to bring MRPC into closer conformity with more of the ABA Model Rules. The original proposals by the State Bar of Michigan Standing Committee on Professional and Judicial Ethics are at:

http://www.michbar.org/directory/committeefinalredline.pdf
http://www.michbar.org/directory/comparisonsidebyside.pdf

but the "redline" is really a comparison of the proposal to the ABA Model Rules, not to the present Rules. The "side by side" is also not really side by side, but rather just adjoining columns in which similar wording is not always on the same line. Comparison is difficult. There is no published Minority Report from the Ethics Committee.

The Michigan Supreme Court proposal was posted July 2, 2004 at:

http://courts.michigan.gov/supremecourt/Resources/Administrative/2003-62.pdf

Once again, there is no "redline" version, showing changes from the Michigan RPC. Identifying the changes is a daunting task. There is little explanation of the reasons for the changes, nor of any competing policy considerations.

At its November 14, 2003 Special Meeting, the SBM Representative Assembly adopted several revisions to the Ethics Committee's proposals. The Supreme Court rejected many of the Assembly's resolutions.

Further discussion and consideration of other alternatives may be in order.

DISCUSSION POINTS Regarding ADM File No. 2002-29
Proposed Standards for Lawyer Sanctions

1. Avoid the "Perfect Storm" Effect.

The amendments to MRPC (currently proposed by the State Bar of Michigan Ethics Committee) were drafted without reference to ADM File No. 2002-29; and ADM File No. 2002-29 was drafted without reference to the proposed amendments to MRPC. Rules should not be amended without knowing the potential sanctions. Sanctions should be set in light of the rules violated.

CONSIDERATION: Neither the Amended MRPC nor ADM File No. 2002-29 should be proposed or adopted until BOTH can be proposed, and acted upon, together.

2. Scienter: Actual Knowledge (Not just Negligence) should be required.

The MRPC is a strict liability, quasi-criminal code, which may result in discipline even though there is no wrongful intent, no bad faith, no injury, and no violation of the "standard of care" followed in actual practice by other lawyers. *In re Woll*, 387 Mich 154, 161, 194 NW2d 835 (1972).

Strict liability codes should not be viewed as a tool for establishing favored standards of care. "Negligence" is a concept incompatible with strict or absolute liability. Inadvertent mistakes, even large ones, should not result in discipline; the civil justice system provides adequate remedies, with the additional protection of jury trials. For discipline, actual knowledge should be required.

CONSIDERATION: Alternative B to 6.13 should be rejected.

3. Isolated Acts of Negligence should not be the subject to discipline.

MRPC is not the tool to cure lawyer incompetence or professional negligence. Too much of this has already crept into the Model Code of Professional Responsibility DR 6-101(a), and the Model Rules of Professional Conduct Rules 1.1 and 1.3. See also ADM File No. 2002-29, Proposed Standards 4.4 and 4.5 (Alts. A and B), and 5.13(c) (Alt. B).

In reality, disciplinary authorities in most jurisdictions, including Michigan, have exercised common sense, and do not attempt to bring disciplinary proceedings based on isolated negligence, instead demanding strong evidence of a course of conduct indicative of a refusal or inability to change; or negligence combined with other factors (abandonment, non-feasance), which when taken in the aggregate, provide a basis for discipline. See *The Professional Lawyer*, Tellam, Bradley, "Isolated Instances of Negligence as a Basis for Discipline," July, 2003, 149-152.

CONSIDERATION:

1) Alternative B to Proposed Standards 4.4 and 4.5, and Alternative B to 5.13(c) should be rejected.

2) In addition, add to Rules 1.1 and 1.3, or as a new ADM File No. 2002-29, Standard 3.2, the following:

> **"Disciplinary proceedings shall not be commenced based on other than knowing misconduct, or on negligent conduct, unless also based upon:**
>
> **a. A course of conduct; OR**
>
> **b. Negligence, combined with other factors, which taken in the aggregate, provide a basis for discipline."**

4. "Injury" should be a factor in considering imposing a sanction.

Especially since Requests for Investigation may be initiated based on reports made by non-clients (third parties, opponents), "injury" is a valid consideration in determining whether ANY sanction should be imposed. It should not be relegated to mere "mitigation," in Proposed Standard 9.32(a). Alternative A to Proposed Standards 4.4 and 4.5 is preferable.

CONSIDERATION:

1) Alternative B to 4.4 and 4.5 should be rejected.

2) Alternative A to 4.4 and 4.5 should be adopted as proposed by ADB, rejecting the deletions regarding "injury to the client."

5. "Informed" consent (as defined in the ABA MRPC) is an undefined "negligence" concept, and should be rejected.

Proposed Standard 4.31 inserts an "informed" consent requirement which is not part of the current Michigan RPC. Presumably, it must be intended to be the ABA MRPC "Informed" consent, as amended by Ethics 2000, which is in twelve (12) of the Amended ABA Rules [1.0(e)[definition], plus 1.2(c), 1.4(a)(1), 1.6(a), 1.7(b)(4), 1.8(a)(3), 1.9(b)(2), 1.10(d), 1.11(a)(2), 1.12(a), 1.18(d)(1) and 2.3(b)], but is not defined ["reasonably adequate under the circumstances"], even though the "informed" consent disclosure must include an explanation "about the material risks… and reasonably available alternatives."

According to the Amended ABA Comment, "A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person *assumes the risk* that the client is

inadequately informed and *the consent is invalid*." There is no method by which a lawyer will be able to predict which facts must be included, or in what circumstances an omission of fact from the proposed "informed" consent disclosure will void the consent. Such "informed" consent disclosures will likely assume the appearance of the forms one now receives from medical providers, but will still always be subject to attack, after the fact. This is an undefined "negligence" in a strict liability code. Lawyers will not know in advance how to conform their conduct to the requirement of the law.

For instance, under ADM File No. 2002-29, Proposed Standard 4.31, a failure to include a fact (no defined materiality threshold) in an "informed" consent disclosure, under RPC 1.7, 1.8 or 1.9, will result in Suspension or Disbarment, and nothing less. Conflicts of interest are continuing status offenses, and this will immediately affect thousands of existing engagements on the day these Sanctions Standards become effective; there is no "transition" provision and no "grandfathering" of earlier engagements obtained under the current, and much different, rules.

Multiple representations [under MRPC 1.7(b)] are common in private practice. As an example, a lawyer who, over several years, has made oral disclosures and collected multiple oral waivers of conflict (e.g., for drafting a husband-wife estate plan), could still be reported to AGC by anyone (including non-client third parties, such as an opponent or a disgruntled beneficiary not receiving all he or she desires under the estate plan). If there is omission of any fact in the "informed" consent disclosure, or if the clients are now deceased and the disclosure cannot be proven, the lawyer would be exposed to a minimum sanction of Suspension. ADM File No. 2002-29, Proposed Standard 4.31. Actual consent or "lack of injury" is no defense, since [under Proposed 4.4 and 9.32(a)], that would go only to mitigation, not culpability. Proposed Standard 4.33 excludes Reprimand as a possibility.

CONSIDERATION: The word "informed" should be deleted from Proposed Standard 4.31.

6. "Reprimand" should not be eliminated as a possible sanction, even in cases of fraud, deceit or misrepresentation.

The purpose of Standards should not be to eliminate the discretion of the discipline system. Alternative B to Proposed Standards 4.63 and 6.13 would eliminate "Reprimand" as a possible sanction in cases of fraud, deceit or misrepresentation, and in instances of false statements, fraud and misrepresentation to a tribunal. The concept of mitigation (see Proposed Standard 9.32 for examples) acknowledges that case-specific facts sometimes justify sanctions less than Disbarment or Suspension. Especially since Proposed Standard 4.6 contains no requirement or measure of materiality, minor or extremely technical untruths could be subject to discipline, even though no injury results to anyone. AGC/ADB should have the discretion for all forms of sanction.

CONSIDERATION: Alternative B to 4.63 and 6.13 should be rejected.

7. Like concerns for the preservation of discretion in lawyer discipline militate in reconsideration of the entire concept of Standards for Sanctions.

Under the guise of a desire for uniformity and an undefined sense of fairness, "sentencing guidelines" attempt to equate the incomparable, by insisting upon like punishments for different offenses with different facts. Especially in the administration of a strict liability, quasi criminal discipline code, discretion is an element which is not only reasonable, but also necessary.

The higher rigidity and lesser flexibility of the Proposed Standards will militate in favor of harsher penalties. By first stating the standard for Disbarment in more general terms, and then successively adding more and more conditions to qualify for lesser sanctions (Suspension, Reprimand), the higher sanction will become the more common result. It may be understandable that AGC/ADB might view this as desirable policy, but there could be unintended consequences.

The Michigan Attorney Discipline System has worked well. Any review of the history of that system forces the conclusion that Michigan is NOT "soft" on bad lawyers, nor on bad lawyer conduct. The recommendations of Hearing Panels have been reasonable and responsible. Cosmetically "tougher" sanctions may not result in more discipline, nor in more effective discipline; lesser discretion for resolutions may result in only more discipline hearings and more discipline expense.

Before we throw away what has worked so well, we should carefully reconsider whether the Proposals of ADM File No. 2002-29 are, in the first instance, necessary. As discretion is sometimes the better part of valor, so we sometimes distinguish ourselves by recognizing that something which is not broken need not be fixed.

CONSIDERATION: Reconsider adoption of any of the Proposed Standards for Lawyer Sanctions.

Discussion Points
Regarding Proposals To Amend the
Michigan Rules of Professional Conduct (MRPC)
(ADM File No. 2003-62)

GENERAL COMMENTS AND OVERVIEW:

1. We are not talking about the "Guidelines" of Professional Conduct, nor the "Suggestions for Good Practices" of Professional Conduct; these are the RULES of Professional Conduct.

The Model Rules are quasi-criminal, strict liability, professional disciplinary rules. *In re Woll*, 387 Mich 154, 161, 194 NW2d 835 (1972). Contributory or comparative negligence by the client or by others, lack of injury, and client consent are not defenses, and go only to mitigation, not culpability. See ADM File No. 2002-29, Proposed Stds. 4.41 – 4.43 (Alt. A) and 9.32, at: http://courts.michigan.gov/supremecourt/Resources/Administrative/index.htm Those sanctions may result in the end of a career, and always result in damage to it.

As such, those Rules should penalize only knowing conduct, not negligent ("should" or "should have known") conduct based on a "reasonable lawyer" standard. Such terms are not intended to be in the Rules, but only in the Comments, which do not add obligations. [See Proposed Preamble, Scope, Clause 14]. Otherwise, the Rules lack the specificity necessary for the lawyer to define, in advance, how to conform one's conduct to the requirements of the law.

Moreover, if we view our only tool as a hammer, then we tend to view every issue as a nail. All issues of professional practice need not be a subject of the Rules of Professional Conduct. For instance, there are effective civil law remedies for ordinary negligence.

2. MRPC is also a platform for civil liability.

Amendments must also be considered in light of the reality that the MRPC are used in Michigan, as well as almost every other state, (either directly or indirectly) as a platform for malpractice claims. *Cf., Beattie v. Firnschild,* 152 Mich App 785 (1986); *Lipton v. Boesky*, 110 Mich App 589 (1981) (rebuttable presumption of negligence); Restatement of the Law Third, *The Law Governing Lawyers*, §52.

The Proposed Rule 1.0 deletes the admonition that MRPC are not intended to create a civil cause of action. Proposed MRPC, Preamble, Scope [20], confirms that ". . . the Rules do establish standard of conduct . . ." and ". . . violation of a Rule may be evidence of breach of the applicable standard of conduct." Even now and with that admonition, the MPRC are used to define the "standard of care" for lawyers in civil lawyer professional liability cases. Any change to MRPC has the potential to increase civil claims, and also to create new ones which do not now exist.

Thus, there is legitimate concern that changes to "should' or "reasonable" in the Model Rules will make it even more difficult to obtain summary judgment based on the lawyer's proven conformity with the Rules' requirements. If the Model Rules are changed to a "reasonable lawyer" standard, the question of what a "reasonable" lawyer would (or should) have done will become a jury question, virtually eliminating summary judgment and vesting any such claim with some value. This is a radical change from current law.

Such a change will vastly complicate the defense of aiding and abetting and of other claims in which the plaintiff admits (or it is uncontroverted) that the lawyer did not "know" of the client's wrongdoing, but the plaintiff (usually after the fact) alleges that a "reasonable lawyer" would (or should) have figured it out from what the lawyer did know, or "should have known."

This is not merely theoretical, nor minor. It holds the prospect of vastly increasing the already growing number of not only lawyer liability claims, but also those AGC complaints, which, at base, are really civil claims for negligence. It will increase the cost of those proceedings and thus the dues requirements to finance them. It will also increase the cost of lawyer professional liability insurance to all lawyers, and thus increase the cost of legal services to all persons. Most importantly, it will divert scarce AGC/ADB resources from those truly serious cases more deserving of their attention.

3. For the same reasons, MRPC is not the tool to cure lawyer incompetence or professional negligence.

Too much of this has already crept into the Model Code of Professional Responsibility DR 6-101(a), and the Model Rules of Professional Conduct Rules 1.1 and 1.3. See also AO 2002-29, Proposed Standards 4.4 and 4.5 (Alts. A and B), and 5.13(c) (Alt. B).

In reality, disciplinary authorities in most jurisdictions, including Michigan, have exercised common sense, and do not attempt to bring disciplinary proceedings based on an isolated negligence, instead demanding strong evidence of a course of conduct or negligence combined with other factors, which when taken in the aggregate, provide a basis for discipline. See *The Professional Lawyer*, Bradley Tellam, "Isolated Instances of Negligence as a Basis for Discipline," July, 2003, 149-152.

One approach might be to add to Rules 1.1 and 1.3, or as a new ADM File No. 2002-29, Standard 3.2, the following:

"Disciplinary proceedings shall not be commenced based on other than knowing misconduct, or on negligent conduct, unless also based upon:

a. A course of conduct; OR

b. Negligence, combined with other factors, which taken in the aggregate, provide a basis for discipline."

ADM File No. 2002-29, Proposed Std. 5.13(c) should be deleted.

Civil reparations are better provided by the civil justice system, controlled by the terms of any private contract between the parties, and with due process protections (such as discovery), and superior methods for determining and awarding damages.

But if AGC and ADB are designated for the task of determining what is "competent" and prosecuting what is not, we should prepare ourselves for a deluge of Requests for Investigation, which will rapidly become the shortcut to what is now a civil lawyer liability claim. Many will rightfully contend that AGC and ADB should have neither the burden, nor the power, to do so.

4. The dangers presented by these amendments are increased by the almost simultaneous proposal by the Michigan Supreme Court to increase dramatically the sanctions for MRPC violations.

The proposed amendments to MRPC were drafted without reference to ADM File No. 2002-29; and ADM File No. 2002-29 was drafted without reference to the proposed amendments to MRPC. Rules should not be amended without knowing the potential sanctions. Neither the Amended MRPC nor ADM File No. 2002-29 should be adopted until both can be adopted together. Many changes to both will be necessary.

For instance, under ADM File No. 2002-29, Proposed Standard 4.31, a failure to include any fact in an "informed" consent disclosure, or to obtain a written confirmation of the waiver of conflict (no "informed consent") under Proposed RPC 1.7, 1.8 or 1.9, will result in Suspension or Disbarment, and nothing less. This will immediately affect thousands of existing engagements on the day these Amended Rules and Sanctions Standards become effective.

Combined, both these new proposals are a "Perfect Storm" of uncertainty which could be devastating. For instance, multiple representations, which already are common in private practice, will become much more complex. In one example, a lawyer who, over several years, has made oral disclosures and collected multiple oral waivers of conflict (e.g., for drafting a husband-wife estate plan), could still be reported to AGC by anyone (including non-client third parties, such as an opponent or a disgruntled beneficiary not receiving all he or she desires under the estate plan). If there is not a written confirmation of the conflict waiver, or if there is omission of a fact in the "informed" consent disclosure [under Proposed RPC 1.7(b)(4)], the lawyer would be exposed to a minimum sanction of Suspension. ADM File No. 2002-29, Proposed Standard 4.31. Actual consent or "lack of injury" is no defense, since that would go only to mitigation, not culpability. ADM File No. 2002-29 excludes Reprimand as a possibility.

The MRPC is not a list of "good practices;" it is a strict liability, quasi criminal code, with severe consequences. The lawyer with an allegedly incomplete "informed" consent disclosure, or without "written confirmation," will then have the pleasure of sending a certified letter to all of his/her clients informing them of the discipline, and folding up the practice, or

resigning employment. MCR 9.119 (A). And all the while, the clients admit that they orally waived the conflict, were not harmed, and in fact, the estate plan says exactly what they directed!

That is not right. There will be those who take comfort that AGC will not pursue such violations, but no lawyer should be relegated to depending on the grace of prosecutorial discretion to obtain what are the minimum requirements of due process and fundamental fairness. Disciplinary rules should be written with sufficient clarity that any reasonable lawyer knows in advance how to conform with the requirements of the law.

The proposals to amend MRPC and to increase the Standards for Lawyer Sanctions should be considered together; none or either should be approved or supported without the full consideration of both, in their final forms.

5. The anxiety to move so fast with this is a mystery.

No state has yet acted on all the Ethics 2000 proposals. See http://www.abanet.org/cpr/jclr/jclr_home.html

Illinois, Florida, California and several others are considering recommendations which materially depart from the ABA Model Rules.

The current Michigan Rules are actually ahead of where the ABA is only now attempting to go. When Michigan first considered the Model Rules and their changes from the Model Code of Professional Responsibility (MCPR), Michigan studied those proposals for five (5) years (from 1983 to 1988) before adopting many of them and changing several. Multiple journal articles and presentations at bar meetings throughout the state produced a wealth of suggestions for variations from the Model Rules. The Michigan changes were neither petty, nor ignored. Much of what Ethics 2000 now finally recommends will not result changes to the current Michigan RPC, because the Michigan RPC already say what Ethics 2000 proposes. The most recent change to Model Rule 1.6 brings the Model ABA Rule closer to what Michigan adopted in 1988.

In other words, Michigan is traditionally a leader, not a follower. Michigan lawyers are smart and contribute admirable ideas. Many of the more recent ABA-proposed changes are matters which have been part of the Michigan rules for decades.

Michigan lawyers should be given the opportunity to lead, again. But Michigan's leadership has never meant forcing the adoption of the ABA Ethics 2000 version of the Model Rules. On the contrary, it has been characterized by the courage to depart from the ABA version where justified.

The Conference of Chief Justices (CCJ) Resolution (No. 35, 8/1/02) has emphasized adoption of ABA-Amended Rule 1.6(b)(2) and 1.6(b)(3), which are not materially different from the current Michigan RPC 1.6. See: http://ccj.ncsc.dni.us/resol35RuleOneptSixEthics2000.html.

Respected members of CCJ have expressed reservations over other Ethics 2000 proposals (such as Rule 1.13, regarding organizational reporting of otherwise protected information) renewed in response to the federal Sarbanes Oxley Act, saying new rules in that area "… are problematic for several reasons, including …some troubling drafting problems in the Act and a potential threat to principles of federalism." See Delaware Chief Justice E. Norman Veasey, "The New Model Rules of Professional Conduct, the Ethics 2000 Recommendations, Congressional Activity and Concerns Over Federalism," *The Bencher* (Nov./Dec. 2002) pages 15-18, also at:
http://www.evergreenethics.com/E2K/Veasey.Bencher0211.html.

6. The agenda should not be to force the Model Rules on everyone.

John Berry, Executive Director of the State Bar of Michigan, was awarded the ABA Michael Franck Award for exceptional contributions in the field of legal ethics. In his award address, he said:

> "…Like it or not a new globalized market economy requires more consistency between states, or the profession will be handcuffed in its ability to serve clients across state and international boundaries. Years of reviewing the ABA Model Rules, followed by lengthy state-by-state consideration and adoption of idiosyncratic codes no longer works."

The Professional Lawyer, 2002 Symposium Issue p. 4.

Others dub it *"Form over Federalism,"* by Robert Creamer: http://www.abanet.org/cpr/e2k/conventions2.pdf. Mr. Creamer's article serves as powerful proof that one uniform system of RPC may not be a good idea, or at least over 43 other states have so concluded.

Ethics 2000 was a valuable exercise; many talented Michigan lawyers served on the Ethics 2000 Advisory Committee. The results were far from unanimous, with many dissents and compromises. The most recent August 2003 changes to Rule 1.6 passed the ABA House of Delegates by razor thin margins (218 – 201). There is ample basis for reasonable persons to disagree.

It is also fair to say that the Ethics 2000 process was dominated by academics and others who do not have clients and who do not practice law. It should not be assumed that these persons necessarily know more about what should be the disciplinary rules for Michigan lawyers.

This agenda for one universal set of Rules is also closely tied to the movements in favor of delimited multijurisdictional practice, some ultimately aimed at having one federal bar admission effective in all states. Lawyer regulation would then be done by the federal government, much as the U.S. Securities and Exchange Commission has recently proposed. Many favor this, but not everyone deems this advisable.

These important principles should be part of any thoughtful debate by the entire Bar. Moreover, at least the TOP TEN Issues of the New MRPC Proposals deserve thorough discussion.

TOP TEN ISSUES

Proposals To Amend the Michigan Rules of Professional Conduct (MRPC)

1. The proposed amendments do not speak sufficiently to two (2) of the areas most frequently encountered in grievances in Michigan:

- **Fee Disputes** [Proposed 1.2(c) limits "scope of engagement" restrictions, and Proposed 1.5 makes fee agreements subject to more, not fewer, attacks];
- **Disputes over File Ownership and Cost of Access** [Proposed 1.4 does not treat this issue].

2. Strength will be added to arguments that a liability civil cause of action is created for every violation. [Former 1.0 (b), second sentence, is deleted.]

3. Conflict consents must be "confirmed in writing." [1.0(b), 1.7 (b), 1.9 (b), 1.10(d), 1.11(a), 1.12, 1.18(d)]

Failure to have a writing is a *per se* violation, even if the client admits waiver and consent, and is not damaged. MRPC is a strict liability, quasi-criminal disciplinary code; mitigating factors (actual consent, no injury) affect only punishment, not culpability.

4. "Informed consent" is in twelve (12) rules [1.0(e)[definition], plus 1.2(c), 1.4(a)(1), 1.6(a), 1.7(b)(4), 1.8(a)(3), 1.9(b)(2), 1.10(d), 1.11(a)(2), 1.12(a), 1.18(d)(1) and 2.3(b)], but is not adequately defined ["reasonably adequate under the circumstances"], even though it must include an explanation "about the material risks… and reasonably available alternatives."

According to the Comment**,** "A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person *assumes the risk* that the client is inadequately informed and *the consent is invalid*." **The omission of any fact from the proposed "informed consent" disclosure will void the consent. To be valid, "informed consent" disclosures will look like SEC proxy statements…and still always be subject to attack, after the fact.** This is an undefined "negligence" in a strict liability code. Lawyers will not know in advance how to conform their conduct to the requirement of the law.

5. The current Michigan concept of "protected information" [defined in the current Rule 1.6 to include both privileged information and "secrets"] is abandoned in favor of "information relating to the representation," which is not precisely defined. This will blur the duty of confidentiality, and could encourage further assaults upon the attorney-client privilege.

6. There is no transition provision, despite the addition of many new requirements.

As an example, by the effective date, each client in every multiple representation must receive a written confirmation of any waiver/consent. Present MRPC 2.2 (Intermediary) disappears; current intermediaries are left with no direction. The deletion of MRPC 2.2 also diminishes the role of lawyers in amicably resolving disputes between clients.

7. The Comments are extensively relied upon to give meaning to the Rule, even though that has not been their function.

The Comments to MRPC are **not** the law.

> "This court allows publication of the comments only as "an aid to the reader," but they are not "authoritative statement[s]." **The rules are the only authority**."
> *Grievance Administrator v Deutch,* 455 Mich 149, 164, 565 NW2d 369 (1997). (Emphasis added.)

Even the proposed MRPC take the same position at Preamble, Scope, Comment [21]:

> "The Preamble and this note on Scope are only intended to provide general orientation and are **not to be interpreted as Rules**. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative." (Emphasis added.)

Little solace should be taken from what is in the Comments. Important matters should be in the Rule.

8. Scienter: Actual Knowledge (Not just Negligence) should be required.

This illustrates the difficulty of attempting to use a strict liability, quasi-criminal code as a tool for establishing favored "good practices" or standards of care. "Negligence" is a concept incompatible with strict liability. Mere mistakes should not result in discipline. In MRPC 1.1 and 1.3, actual knowledge should be required. [See ADM File No. 2002-29, Proposal B to 6.1]

A single misdirected fax or email, or a single mis-deposit into the trust account, should not result in discipline. When the breaches of the standard of care are serious, or the damages material, the civil justice system already provides remedies.

In view of proposed ADM File No. 2002-29, competence (MRPC 1.1 and 1.3) should not be regulated by AGC/ADB. Isolated instances of lack of skill or diligence, as well as negligence, have no place in a strict liability, quasi criminal discipline code.

9. A lump-sum or non-refundable fee that is earned at the time of engagement is still left in a doubtful status.

The proposed amendments purport to authorize non-refundable fees, earned at the time of engagement (proposed MRPC 1.5(f)), and would permit immediate deposit of such fees in the lawyer's own account (proposed MRPC 1.15(c)). This is necessary, if only to restrict the abuse of scheduling an initial interview with a lawyer, not for the purpose of engaging the lawyer, but rather for the purpose of communicating sufficient "protected information" to disqualify the lawyer and firm from representing an opponent.

But in order for such a fee to be "earned," it is mandatory that the lawyer "in fact . . . turns down other cases, and marshals law firm resources in reliance on the fee agreement." (Proposed 1.5(f)(4).) This requires an after-the-fact determination which is not only impossible, but also is inconsistent with MRPC 1.5(a)(2), which requires only a "likelihood" that other employment will be precluded. If existing engagements are "in fact" disregarded to obtain the newer "lump sum" fee, the lawyer may be violating the "hot potato" principle of MRPC 1.7. Likewise, "in fact" marshalling firm resources does not reasonably occur until after the inception of the engagement, when the fee is already earned.

10. ADM File No. 2002-29 (Standards for Imposing Lawyer Sanctions) together with the Ethics Committee's Proposed Amended MRPC create the "Perfect Storm" of uncertainty.

The proposed amendments to MRPC were drafted without reference to ADM File No. 2002-29; and ADM File No. 2002-29 was drafted without reference to the proposed amendments to MRPC. Rules should not be amended without knowing the potential sanctions. Neither the Amended MRPC nor ADM File No. 2002-29 should be proposed or adopted until both can be proposed and adopted together.